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IN THE MATTER OF A BOARD OF INQUIRY UNDER THE HUMAN RIGHTS CODE,
Statutes of Ontario, 1981, Chapter 53, as amended.

TAMMY MCLEOD AND NEXT FRIEND BRENDA MCLEOD

Complainants

- and -

YOUTH BOWLING COUNCIL OF ONTARIO, NATIONAL COUNCIL, WALTER
VALENTAN AND CARL MALCOLMSON

Respondents

BOARD OF INQUIRY: Constance B. Backhouse

APPEARANCES:

Counsel for the Ontario Human
Rights Commission:

Ms. Kim Twohig
Mr. James Eastwood

Counsel for the Respondents:

Mr. John Pelech

HEARING:

18 July 1988, London, Ontario

On 31 August 1987, I was appointed to serve as a Board of Inquiry by the Minister of Labour pursuant to the Ontario Human Rights Code, 1981 to hear a complaint made by Tammy McLeod and her next friend, Brenda McLeod, against the Youth Bowling Council of Ontario, the National Council, Mr. Walter Valentan and Mr. Carl Malcolmson. The complainants allege discrimination in services on the basis of handicap, contrary to sections 1 and 8 of the Code.

THE EVIDENCE

Tammy McLeod is eleven years old. She lives with her family in Strathroy, Ontario. Tammy's mother, Brenda McLeod, acted as her next friend in this proceeding. Tammy's mother testified that her daughter, Tammy, was diagnosed with cerebral palsy at the age of 15 months. The cerebral palsy has affected Tammy's motor power and coordination as well as her ability to speak. She uses a wheel chair. Cerebral palsy has had no impact on her mental abilities.

The respondents admitted, without requiring medical evidence, that the nature of Tammy's cerebral palsy was such that her condition came within the definition of "handicap" as defined in section 9(1)(b) of the Code:

"any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coord-

ination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device...."

Brenda McLeod testified that Tammy has always lived at home, and attends public school. This fall she will enter Grade 6 at Southdale Public School. Her younger brother Chad (aged 10) who does not have cerebral palsy, will enter Grade 4. Brenda McLeod indicated that Tammy does well at school, and that her relationship with the children at school and in the neighbourhood was very good.

Due to her disability, Tammy is limited as to physical recreation. However Tammy's parents concluded that Tammy could be enabled to bowl with the use of a "ramp assist". Tammy's father built a simple wooden ramp which gave Tammy the opportunity to bowl with her peers.

Brenda McLeod described the process. She would carry Tammy to the bowling lane, and place Tammy in a chair set well behind the foul line. Brenda McLeod would place the top end of the ramp assist on the lower half of Tammy's body, and the bottom end of the ramp on the floor, again back of the foul line. Next Brenda McLeod would place the bowling ball at the top of the ramp assist.

Tammy was physically able to hold the ball while moving the

ramp to position it into the best place for guiding the ball's direction. Tammy then released the ball by hand and it rolled down the ramp. The incline of the ramp gave the ball the speed necessary to reach the end of the bowling lane. After the shot, Tammy's mother removed her chair and the ramp assist from the lane. The entire process of positioning, shooting, and removal was both quick and efficient. A video-tape, produced by counsel for the Human Rights Commission, showed Tammy bowling along with her brother and friends and was of great assistance in illustrating how the ramp assist functioned. Respondents admitted that without the ramp assist, Tammy would be physically incapable of bowling.

Tammy began bowling, using the ramp assist from the start, at the age of six. She, her brother, and other neighbourhood and school friends bowled every Saturday morning at the local bowling alley, B & D Lanes. Along with sixty other children, she played in the Bantam league. These young bowlers were required to be registered with the Youth Bowling Council, which in turn sent the registrations to the National Youth Bowling Council Office.

Throughout the season bowling averages were tallied and recorded, and Tammy soon learned to hold her own with the competition. The major and most popular event of the Youth Bowling Council agenda was the annual "4 Steps to Stardom" tournament. The four steps entailed competing at the local,

zone, provincial and national levels. In 1985, Tammy entered the local tournament along with the sixty other Bantam bowlers of the B & D Lanes in Strathroy. This was her first tournament. On the basis of performance over eight games (played over the course of four weeks), twelve children qualified to move on to the zone tournament in London. Tammy was one of the victors.

Before Tammy could bowl in the zone tournament, however, she was disqualified from further competition in the "4 Steps to Stardom" series. Mr. Luscombe, the proprietor of B & D Lanes, told the McLeods that Tammy had been ruled ineligible because she was using a ramp to deliver the ball. Mr. Valentan, the Administrator of the Youth Bowling Council in Scarborough, set out the rationale in a letter to Brenda McLeod dated 2 January 1986. He indicated he was enforcing Rule 1(b) of the Canadian Five Pin Bowlers' Association Official Rules and Regulations (1978) which stated: "A bowling ball must be delivered entirely by manual means and shall not incorporate any device either in the ball or affixed to it."

Although Brenda McLeod contacted both Mr. Luscombe and Mr. Valentan to object, they refused to alter their ruling. Tammy was very upset and hurt that she had been disqualified. Indeed, she felt so badly that she elected not to bowl at all the subsequent year. Since September 1987, she has returned to bowling, but although she is permitted to bowl in the in-house

league, she remained ineligible for the tournament competition.

The McLeods filed a complaint with the Ontario Human Rights Commission on 2 April 1985. Section 1 of the Code provides that "every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of...handicap." Section 16 qualifies section 1 as follows:

s.16 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

Counsel for the Commission argued that on account of Tammy's handicap, she required a ramp assist to bowl. Disqualifying her from competition because of her ramp assist thus constituted a denial of services because of handicap.

Tammy McLeod took the stand during the hearing and gave her evidence through a written statement. Her handwritten document, submitted to the Board of Inquiry, read as follows:

"My name is Tammy Lee McLeod. I am 11 years old. I love bowling so much I want to be a star! Bowling is the only sport that I am able to play right along with my friends. I am a pretty good bowler and have qualified for several tournaments. When they told me I was not allowed to bowl in them I was very mad. All I want to do is go out and bowl and have fun and be able to compete just like my friends!

The End!"

May Calcutt, program director at B & D Lanes, testified that she supported Tammy's application to play in the tournament. She also stated that the other children had never complained about Tammy's using the ramp assist.

Conn Casey, an individual with professional bowling experience, coaching qualifications, and background as a manager of bowling centres, testified as an expert witness for the Commission. He stated that when he first saw the ramp assist, he expected that it would give Tammy an advantage by improving accuracy and increasing ball speed. He then conducted a series of tests on the ramp assist which caused him to change his mind.

Casey tested Tammy's accuracy against her brother and three of her bowler-friends and concluded that "in my opinion, Tammy has no advantage at all." A radar gun loaned by the Strathroy town police was used to compare Tammy's speed with the four other children. Tammy's speed was comparatively low and relatively constant, although she was able to vary it a bit depending on her physical release of the ball. The inability to vary the speed significantly, and the low speeds involved were disadvantageous to Tammy's game. Casey testified that the ramp was too small to create great velocity, and that Tammy could not develop enough ball speed to create the pin carry the other children had.

Considering both accuracy and speed, Casey concluded that "overall, Tammy is at a disadvantage with the other children."

Under skillful cross-examination by Mr. Pelech, counsel for the respondents, Casey admitted that the ramp could be refined to improve both accuracy and speed levels. He also identified the critical components of a bowler's movement: starting stance, a 3-4 step approach, arm swing, follow through, and release. Consistency was the goal, and a certain mental factor was involved in achieving this. Casey admitted that with children, the key to their competitive success was control of the ball. He conceded that Tammy used no skill in releasing the ball, since the ramp controlled its release.

The respondents called only one witness, Eric Whittaker, the chief executive officer of the Ontario Five Pin Bowlers' Association. Mr. Whittaker also qualified as an expert witness, having had decades of experience in competitive bowling, bowling instruction, and volunteer organizing of bowling associations. Mr. Whittaker had not conducted tests on the ramp assist. However he stated that his objection to the device was that it allowed a consistent release of the ball. The unique part of five pin bowling, he argued, was the release of the ball. The ball had to be held in the palm of the hand and released. The rotation or a turn of the hand could dramatically alter the course of the ball. Tammy was not participating in any of this

and to allow her to play in tournaments would "compromise competition."

DECISION

The evidence indicates that Tammy McLeod was denied equal treatment with respect to services because of her "handicap". Counsel for the respondents attempted to argue that she was granted access to recreational services, and restricted merely with respect to competitive opportunities. This seems to me to be an untenable distinction. Ms. Calcutt and Mr. Whittaker both testified that the 4 Steps to Stardom tournament was the major event of the Bantam bowling season. Its popularity with the children was obvious. The challenge of using skills developed at the in-house league to compete successfully with children across the province or farther was part of what made the recreational program successful. To try to separate the recreational program from the competitive tournament would amount to an artificial severance.

The respondents suggested that Tammy should be allowed to participate in competitions among similarly handicapped persons. It is not a sufficient answer to Tammy, however, to suggest that she be permitted to compete with other individuals similarly situated. There was no evidence given of an alternate league for individuals requiring ramp assist devices, and I tend to doubt

whether there would be sufficient individuals of Tammy's talents to provide such competition in Strathroy. Furthermore, even if there were, segregation is not an acceptable answer here. Tammy is well integrated in her educational and social community, and she wants physical recreation activities which will augment this. Denial of access to competitive opportunities constitutes a denial of services in this context.

Rule 1 (b) of the Canadian Five Pin Bowlers' Association Official Rules and Regulations (1978) requires that bowling balls be delivered entirely by manual means, excluding the use of any devices. This appears on the face of it to be a neutral rule, applicable to all individuals equally. However its impact is disproportionately damaging to some physically disabled people. As such it runs afoul of section 10 of the Code:

A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground, but that would result in the exclusion, qualification, or preference by a group of persons who are identified by a prohibited ground of discrimination....except where

(a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances....

Holding all devices ineligible bars individuals with cerebral palsy from the opportunity to bowl.

Counsel for the respondents argued that an exclusion of this nature should be held "reasonable" and exempted under s.10(a) because of the principle of competition. Tammy, he asserted, was

not participating in the sport of bowling "in its true sense". "Ramp bowling" was a form of bowling, but one which was entirely different in skill level from the ordinary game of bowling. The ordinary bowler had to involve his/her anatomy in stance, approach to the fault line, arm swing, follow through and release. All these movements were subject to error, especially when one took into account the tension and pressure accompanying competition. Only one of Tammy's movements was subject to error.

It should be noted that neither party called any medical evidence concerning cerebral palsy generally or Tammy's condition specifically. Although both counsel were quick to speculate in argument about Tammy's skill levels and movements associated with her bowling, this was done without the aid of any factual evidence. For example, there was a great deal of surmising about the effect of tension on Tammy's game, including discussion about whether Tammy developed an adrenalin rush such as other competitors would experience under pressure. Tammy herself was not questioned at any length, either in chief or on cross-examination, about the particular movements and skills she exercised in bowling. Indeed, the perspective of individuals with cerebral palsy or medical experts on cerebral palsy was distinctly lacking on this point.

This was a serious omission, since it is my sense that individuals who have no direct experience of a physical

disability, however well-meaning they may be, often misjudge or mischaracterize the situation through insensitivity to differences. My impression from watching the video was that counsels' description of Tammy's ball delivery was somewhat simplistic. In the use of the ramp assist, Tammy may be exhibiting physical and mental skills far beyond those an uninformed observer can see. Without further evidence, however, we are all left in the dark. The decision in this case does not turn on this point, but I want to note that cases involving disability issues should include more detailed evidence from those who are fully cognizant of the realities affecting the individuals concerned.

As mentioned above, respondents' main argument rested on the premise of competition. They asserted that to allow Tammy to bowl with a ramp would be unreasonable. The consequences of permitting her to bowl would be "infinitesimal" and would go far beyond the sport of bowling. Competitions would no longer measure equal skills, the skills of ordinary bowlers would be compromised, and the nature of artificial aids would require constant scrutiny.

The concept of competition, while essential to much sport, should not be used to bar access to "differently-abled" individuals. In competitive sport outcome, not process is the critical variable. Competition is designed to rank individuals

in order of athletic merit. Rules are designed to ensure the process is not unfair, so that no one will have an unfair advantage and the best will win.

But rules are only partially successful. If one really tried to equalize the process, variables such as height, weight, strength, visual acuity, access to coaching, access to bowling lanes for practice, and foot-gear would have to be controlled. Furthermore, there would be a rigidly-defined manner of ball release, permitting no deviation in stance or approach. It is interesting to note that children of Tammy's age often release the ball with two hands, rather than one, because the size of their hands makes it impossible to control the bowling ball otherwise. Yet the rules do not prohibit variety of ball release in this respect.

Since rules only partially equalize the process anyway, we should scrutinize with care rules that adversely impact upon groups such as the physically disabled. Rules should be designed to accommodate variation insofar as this does not prejudice the outcome. Disabled persons who need to alter the process of a sport should be given competitive opportunities where this does not result in an unfair advantage with respect to the outcome. Individuals who have cerebral palsy should be allowed to bowl with a ramp assist where this does not give them an unfair advantage over "temporarily able-bodied" competitors. Where they

labour under a disadvantage, as the evidence shows here, the competitive outcome is clearly not compromised.

Counsel for the respondents raised the spectre of "floodgates" problems following a decision to grant Tammy access to competitive bowling. In my opinion the rights of individuals should never be abridged because of speculation about additional claims in the future. Where such claims do arise, it would become the responsibility of the respondents to develop revised rules and procedures to assess artificial devices to ensure they are necessary and that they do not impart an unfair advantage.

Indeed the Canadian Five Pin Bowlers' Association has already anticipated the need for such a system, as evidenced by the latest revision of its "Official Rules and Regulations" booklet, in 1987. The old rule 1(b), which was used to bar Tammy's ramp assist, has been amended to recognize the need for certain mechanical devices:

Rule 5 (a) Where an artificial or medical aid is necessary for grasping and/or delivering the bowling ball because of any...disability of the hand or arm..., permission to use such aid in sanctioned league or tournament competition, may be granted by the Board of Directors of the Provincial 5 Pin Bowlers' Association under the following conditions:

- 1) The aid does not incorporate a mechanical device with moving parts which would impart a force or impetus to the ball.

- 2) A description or drawing and/or model of the aid is furnished to the Provincial 5 Pin Bowlers' Association for examination.

- 3) A doctor's certificate, describing the disability,

together with his/her recommendation that the aid should be used, is furnished to the Provincial 5 Pin Bowlers' Association.

(b) If permission is not granted, the claimant shall have the right of appeal to the Canadian 5 Pin Bowlers' Association.

...

(d) Permission to use the device may be withdrawn at any time if sufficient cause is found to do so.

These rules were enacted after Tammy's exclusion in 1985, and apparently do not apply to child bowlers even today. They do illustrate, however, that these problems have been recognized within the sport of bowling, and that creative procedures can be developed to increase access for disabled individuals.

Mr. Whittaker testified that over 4,000 physically disabled individuals participated in bowling in 1987. Bowling appears to be one of the sports that has historically been the most accommodating to persons of different abilities. The 1987-88 handbook of the Youth Bowling Council recognizes this explicitly when it states:

Bowling in organized youth leagues provides the best opportunity for young people of all ages, to learn the values of sportsmanship (sic) and fair play. The fact that bowling teaches co-ordination, and good fellowship, and may be played alone, with a friend, with family, or in competition with others of like ability, makes it the # 1 participation sport in Canada. The fact that bowling is the only sport that ALL children, regardless of mental or physical abilities, may take part in as equals, makes bowling the # 1 social recreation in Canada.

That bowling has proven such a welcome environment for

individuals of widely differing talents may account for its position as the sport under attack in this type of complaint. While the present respondents may view this status as a rather dubious distinction, one could equally argue that it is a tribute to the sport and its potential.

REMEDY

Section 40 of the Code gives a board of inquiry wide remedial authority to direct compliance and restitution. In this case the respondents are ordered to allow Tammy McLeod to participate in competitive tournaments along with her peers. The Code also authorizes a board to rule in respect of future practices, and this is the type of case which warrants a direction for the future as well. Respondents must develop and enact a rule setting forth a fair procedure for young bowlers with hand or arm disabilities to seek exemption from the general provisions prohibiting mechanical devices. Such a rule might be similar to the one presently found in the 1987 edition of the Canadian Five Pin Bowlers' Association Official Rules and Regulations, or it might be fashioned specifically for youthful bowlers.

On the matter of restitution for Tammy McLeod, counsel for the Commission argued for an award of \$2,000 for mental anguish,

and interest from the date of the complaint. Counsel for the respondents argued that the Youth Bowling Council was not the type of organization against which damages should be ordered, since it was in the position of having to raise money for its own competitions.

Tammy has suffered substantial damage from the respondents' breach of the Code. Bowling was the only form of physical recreation she could do, and it permitted recreational and competitive contact with her friends. Subsequent to her elimination from competition in 1985, Tammy stopped bowling entirely for a year. Since the fall of 1987, she has been back bowling at the local level, but it is now 1988 and she has yet to engage in competitive sport again.

Tammy's loss would have been significantly less if this matter had been disposed of expediently in 1985. A good portion of the delay is attributable to the respondents. I was appointed to hear this inquiry on 31 August 1987. A hearing was set for 21 September 1987, which was adjourned sine die on 16 September pending minutes of settlement. These minutes were forwarded to the respondents on 2 October 1987. Despite several inquiries from counsel for the Commission and myself, respondents did not take any further steps. It was not until late spring in 1988 that respondents notified that they were unwilling to settle and required a full hearing. While the vagaries of negotiations

concerning settlement are obvious, the respondents must accept some share of responsibility for the continuation of Tammy's deprivation.

Given the special and very important role that bowling played in Tammy's social life, I have decided that damages are warranted in a case of this nature. Taking into account the mental anguish she experienced, the denial of competitive opportunity, the delay factor, and the prevailing rate of interest, I am awarding Tammy McLeod the lump sum of \$2,000.

Four respondents are named in the complaint: Youth Bowling Council, National Council, Walter Valentan and Carl Malcolmson. National Council is, I assume, a shortened version of the name of a national bowling association. Given the inaccuracy in nomenclature and the paucity of evidence against this organization, I am not holding it responsible for implementing the award. Carl Malcolmson was not implicated in the evidence before me, and will also be exempt from responsibility. Thus the remaining respondents, Youth Bowling Council and Walter Valentan, will be jointly and severally liable for implementing the remedy as set forth.

Date of decision: July 18, 1988